Revised

Testimony of Thomas N. Slonaker
Former Special Trustee for American Indians
Senate Indian Affairs Committee Hearing
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Thank you, Mr. Chairman and members of the Committee.

I very much appreciate the opportunity along with Mr. Homan, the first Special Trustee for American Indians, to discuss with you the issues that have impacted the Special Trustee since the position was created pursuant to the 1994 American Indian Trust Fund Management Reform Act ("1994 Act").

The Senate confirmed me in late May 2000 as the second Special Trustee. I served through the end of the Clinton administration and was held over by President Bush. I then served briefly as the Acting Secretary of the Interior until Secretary Norton was herself confirmed and continued thereafter as the Special Trustee until I was asked by her to resign in late July of this year. I had left retirement following thirty-six years of private sector trust and banking experience to undertake the Special Trustee's responsibilities.

The Government's Indian Trust Obligation

It is important to note that the nature and scope of the Federal government's overall obligations in the area of Indian affairs is complex and reflects a history dating nearly to the establishment of the United States. The 1994 Act, however, addresses a discrete part of those obligations, the Indian trust assets, as that term is defined in the Secretary's Principles for Managing Indian Trust Assets. As trustee the government holds assets (mostly land) for some 300 tribes and approximately 250,000 individual Indians assets for identifiable beneficiaries. *Like every other trustee, the government trustee is required to know at every moment what assets are held in trust, how those assets are invested and managed, and to whom the proceeds of that management belong and are to be paid.*

The government's fiduciary duties with respect to the Indian trust assets it holds are separate and apart from the government's treaty obligations to the numerous individual tribes. The Secretary's fiduciary relationship exists directly between the Secretary as trustee-designate and the tribal or individual beneficial owner. The Secretary's trust responsibility, as set forth in the Mitchell II decision of the Supreme Court as well as the 1994 Act itself, is essentially equivalent to the role of a private trustee, and is guided by the "rules that govern private fiduciaries". The trust responsibility of the government requires the use of a system of motivating concepts and principles very different from those used in the discharge of political, statutory or contractual obligations.

The Role of the Special Trustee

In essence, the 1994 Act provides that the Special Trustee would monitor the historical accounting and oversee the reform of the trust process for the benefit of tribal and individual Indian beneficiaries. In doing so, the Special Trustee would be responsible to the Secretary of the Interior and at the same time provide reports to the Congress on the progress of these efforts. Essentially, the Act requires the Special Trustee to provide the transparency necessary for the benefit of the Congress as well as for the Secretary.

The *Cobell* class action litigation subsequently led to court-mandated reporting to it by the Secretary on the progress of trust reform. As part of that effort, the Special Trustee--who for a while compiled the report on behalf of the Secretary and the Department--also provided his observations on the progress of trust reform for the benefit of the court. Both Congress and the court, therefore, have looked to the Special Trustee to provide that transparency for measuring progress towards trust reform.

Obstacles to the Special Trustee in Carrying out His Duties Under the Act

The Special Trustee was not provided under the law with any direct, line management of the trust reform. An exception to this was the transfer by then Secretary Babbitt in 1996 of the Office of Trust Funds Management (OTFM) from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee (OST). In my view and that of others, OTFM became the model for a fully functioning organization among those trust reform projects the Department has undertaken.

The Special Trustee sought line authority over all aspects of trust reform and, therefore, over those fiduciary trust activities spread across the BIA and parts of the Minerals Management Service, the Bureau of Land Management, and other organizations within Interior. Instead, in mid-2000 Secretary Norton provided the Special Trustee with "directive" powers, i.e., an ability to order changes for trust reform where needed change was not being made by organizations within the Department. The directive power granted by the Secretary, when used, was subject to an appeal to the Secretary by the affected trust individual or organization, but worse, as witness a directive issued by the Special Trustee last year, subject to prolonged bureaucratic delay. This was not a workable answer for effective organization change.

The Bureau of Indian Affair's middle management ranks, along with some tribes, are seemingly adamant in their opposition to a separate organization, even a separate chain of command, to promulgate the government's fiduciary responsibilities. Interestingly enough, the current Secretary late in 2001 proposed a plan (named BITAM) whereby the entire trust responsibility of the Government would be placed into a *new* and *separate* organization within Interior, withdrawing and consolidating fiduciary trust functions from the BIA, OST and other parts of the Department. The Special Trustee applauded that proposal as potentially achieving the separate chain of command and the requisite

accountability for properly carrying out the trust responsibility. I testified on February 6, 2002, before the House Resources Committee on the Secretary's proposal as follows:

> I concur with the Secretary's concept of a single organizational unit responsible for the management of the Indian trust assets. That organization has the potential of addressing the accountability concerns by placing one executive, responsible to the Secretary, in charge of the delivery of the appropriate, required trust services to tribes and individual Indians. I believe a single organization with its own chain of command, that is, not diluted by intersecting other Departmental chains of command, can work better than the present arrangement. *The devil, however, is in the details, and the new organization must have the right executive direction and actually hold people accountable.* (Emphasis added)

You cannot continue to assign the task for overhauling trust reform to the same people and organizations that have failed in that assignment before.

The tribes often can be an obstacle to trust reform: In the lengthy tribal consultation process that followed the Secretary's proposal announcement, it became quite clear that the tribes--themselves beneficiaries of the Trust--did not want the fiduciary trust function removed from the BIA at all. Nor did they even want the regional directors and agency superintendents removed from the fiduciary trust chain of command--an essential separation to eliminate potential conflicts of interest with the trust beneficiaries and assure dedication to the trust obligation.

The consultation meetings also highlighted another often-misunderstood aspect of the Indian trust responsibility: The trust responsibility is really *two* categories of responsibilities. One can be labeled as the "fiduciary" trust responsibility that refers to the duty to account for the trust assets (land and monies primarily) that in turn provide income to the beneficiaries. The other trust responsibility is a broader one derived from treaty and law, and is the obligation of the government relative to providing social services, education, roads, police protection, etc. to Indian tribes and individuals--the non-fiduciary trust duties, if you will. The fear on behalf of the tribes appears to be that the BIA may be gutted by withdrawal of the *fiduciary* responsibilities and, thus, somehow the honoring of the *broader* trust responsibility may be jeopardized.

Thus, the dilemma facing the Secretary is this. On the one hand, in order to accomplish *fiduciary* trust reform, the strong management and accountability that are required are best accomplished by a separate organization for fiduciary trust within the Department, or even better, outside the Department altogether. On the other hand, such separation of trust responsibilities appears to be alien to many tribes. As is often heard, the tribes seem to have trouble living with the BIA, but are reluctant to be without it. It is also apparent, incidentally, that to date *individual* Indian beneficiaries don't have much of a voice in the consultations nationally.

The Special Trustee should be embraced by the Secretary to assist him or her to direct reform and effect change. Surprisingly that has not happened. The reason for that

resistance by the Secretary appears to be the reluctance to tolerate the transparency of actual trust reform progress, presumably because such candor may complicate the Secretary's effort to defend against the current "show cause" litigation in the contempt trial. Furthermore, the Special Trustee has not been perceived as "a part of the team" when he has been obligated to respond honestly on the state of trust reform to Congress--and the Court. In fact, the Special Trustee in at least recent months has often been excluded from trust reform meetings with the Secretary and most senior Department officials. It appears, instead, that the intent of the Department management is to isolate the Office of the Special Trustee.

Another obstacle to trust reform and to the Special Trustee has been the attempt to diminish the standard of the government's trust duty itself. For whatever reason--litigation or otherwise--there appears to be considerable reluctance in both the last and the present administrations to acknowledge the high standard of trust duty required of the government as the Trustee under various laws and Supreme Court decision--even to include the Secretary's Trust Principles in the Department's manual. In testimony to this Committee this year, the administration has not defined the government's trust responsibility when requested and instead looks to the possible weakening of the trust duty by the Supreme Court with the two trust cases before it now.

Recommendation

There is no reason that the Department--with the Secretary's leadership--cannot recognize and demand compliance with the trust duty. There appears to be no political will to ensure compliance with the government's trust obligation.

Only a single, direct line chain of command for all personnel supporting the trust activities has a chance of succeeding. Only the Special Trustee with her/his legal responsibility, trust experience and Congressional obligation is best positioned to exercise the required authority on behalf of the Trustee-designate, but the Special Trustee's position doesn't have that line authority.

In my opinion, the Department is incapable of executing trust reform and, indeed, even knowing what and how to do so, or to provide the experienced, competent people resources needed in many cases. More than being incapable, there is often a seeming unwillingness to adhere to the trust principles of the 1994 Act and the Department's own manual, *as well as to hold people accountable for their actions with consequences for poor performance*.

I have come to the conclusion, therefore, that it is important to have a strong oversight role *outside* the Department, responsible to the Congress, and headed by an experienced trust management executive advised by a board of trust experts and Indian leaders. In a sense, this is the Office of the Special Trustee as established by the 1994 Act--but placed outside the Department. This executive oversight position and the attendant organization need to have the ability to require change when needed changes by the Department itself are not forthcoming.

There are some instructive models available in the form of government-sponsored enterprises that have addressed issues of public policy in other venues such as the failures of many savings and loan institutions a few years back. Such outside authorities can provide for eventually returning the trust operations to the Department at such time as the systems, procedures, records, and the leadership are ready and the Department exhibits the ability to carry on with the fiduciary trust responsibilities.

Thus, in my opinion, trust reform is never going to happen until there is an authority *outside* the Department that can compel compliance with the government's trust duty and demand accountability. The most recent decision of the DC District Court, which stopped short of appointing a receiver, hopefully will enforce the enactment of trust reform. That solution will succeed only, in my opinion, if the Department is forced to comply with needed change.

Thank you, Mr. Chairman and members of the Committee, for the opportunity to present these remarks today.